THAN KOK LEONG v. LOW KIM HAI

[O.C.J. (Mohamed Dzaiddin J.C.) July 21, 1980]
[Kuala Lumpur – Civil Suit No. 1043 of 1978]

Landlord and Tenant – Claim for possession – Oral lease for 3 years with option to renew for same period – Effect of oral and unregistered lease – Oral tenancy not enforceable – National Land Code, ss. 213 & 228(2).

Land Law – Oral lease not enforceable – National Land Code, ss. 213 & 228(2).

The plaintiff in this case was the registered proprietor of premises Nos. 99, 99A and 99B of 3rd Mile, Jalan Klang, Kuala Lumpur. He purchased the said premises from one Patricia Perera. At the time of the purchase, the defendant was a tenant paying a rental of $950.00 per month. On January 26, 1978 the plaintiff as registered proprietor gave notice to quit for vacant possession to the defendant, the said notice expiring on February 28, 1978. Despite such notice, the defendant refused to vacate. The defendant contended that his tenancy was a lease pursuant to an oral agreement made between him and the former landlord who had granted him an oral lease for a period of 3 years commencing January 1, 1974 with an option to renew for the same period of 3 years to be exercised by him.

The defendant filed a counterclaim against the plaintiff claiming specific performance of the said oral agreement and an injunction to restrain the plaintiff from acting in any manner contrary to the purported lease and damages.

The issue before the court was the effect of such an oral and unregistered lease.

Held: (1) on the balance of probabilities there was such an oral agreement for lease for a period of 3 years with an option to renew made between the defendant and the former landlord in 1974,

(2) the said oral agreement came under section 213 of the National Land Code and was therefore not binding on the plaintiff. Section 228(2) of the Code likewise provides that an option conferred by any oral tenancy shall be unenforceable;

(3) section 213(3) impliedly excludes the question of knowledge or notice actual or constructive because it says that "unless prior to the date on which the dealing referred to, the tenancy has become protected by an endorsement on the registered document of title". The defendant's contention that "actual notice of occupation of possession amounts to constructive notice of the extent and interest of the person in possession" must therefore fail;

(4) the principle of equitable notice as found in English law has no application in land dealings in Malaysia: section 6 of the Civil Law Ordinance 1956;

(5) section 26 of the Specific Relief Ordinance 1950 has no application to the Torrens System. The defendant's counterclaim would therefore be dismissed with costs.

Ed. Note: There was an appeal to the Federal Court in this case. The appeal (F.C.C.A. No 184/80) was heard on September 23, 1982 and dismissed with costs.

Cases referred to:–

(1) *Eng Mee Yong* v. *Letchumanan* [1979] 2 M.L.J. 212.
(2) *T. Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267.
(3) *Ong Chat Pang* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224.

[The following authorities were also cited in argument: *Mercantile Bank* v. *Official Assignee* [1969] 2 M.L.J. 196; *Fraser* v. *Walker* [1967] 1 A.C. 569, 585; *Barnhart* v. *Greenshields* (1853) 14 E.R. 204, 209; *Yong Tong Hong* v. *Siew Soon Wah* [1971] 2 M.L.J. 105; *Tong Swee King* v. *Pegang Mining* [1967] 2 M.L.J. 214, 220; *Ong Tin* v. *Seremban Motor Garage* (1917) 1 F.M.S.L.R. 308; *Datin Siti Hajar* v. *Murugasu* [1970] 2 M.L.J. 153, 155; *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.* [1913] A.C. 491.]

CIVIL SUIT.

Lee Tat Boon for the plaintiff.
Gopal Sri Ram for the defendant.

Cur. Adv. Vult.

Mohamed Dzaiddin J.C.: This is a claim for possession of premises known as Nos. 99, 99A and 99B, 3rd Mile, Jalan Klang, Kuala Lumpur (hereinafter called "the said premises").

The Plaintiff is the registered proprietor of the said premises. He purchased the said premises from one Patricia Perera on or about July 8, 1976. At the time of the purchase, the Defendant was a tenant of the former registered proprietor paying a rental of $950/- per month. On January 26, 1978 the Plaintiff as the registered proprietor gave notice to quit for vacant possession to the Defendant, the said notice expiring on or about February 28, 1978. Despite such notice, the Defendant still holds on the said premises and refuses to vacate. The Defendant contends that this tenancy is a lease pursuant to an oral agreement made between him and the former landlord who had granted him an oral lease for a period of 3 years commencing January 1, 1974 with an *option* to renew for the same period of 3 years to be exercised by him.

The Defendant, in addition, filed a counterclaim against the Plaintiff claiming specific performance on the strength of an oral agreement made between him and the former landlord; an injunction to restrain the Plaintiff from acting in any manner contrary to the purported lease, and damages and costs.

In reply, the Plaintiff contends that the option conferred by the alleged oral tenancy is unenforceable against him and also maintains that as the te-

nancy was a monthly tenancy, the notice to quit was a valid and proper notice.

As agreed by both Counsel, the question for determination by this court is whether the Defendant is a lessee of the said premises pursuant to an oral lease alleged to have been granted to him by the former landlord. If so, what is the effect of an oral and unregistered lease? Further, if there was such an oral agreement, then the next question is whether the Plaintiff is bound by such an agreement.

The Defendant in his evidence stated that in July, 1973 he came to Kuala Lumpur from Kota Bahru to help his elder brother, Low Kian Leng in his business at the said premises. Patricia Perera was then the landlord. She used to come to the premises, sometime alone and at times with her son. Some time in 1974, the Defendant had a meeting with the landlord's son. After January that year, the Defendant with the consent of the landlord, took over the tenancy from his brother. As the conditions of the premises were not good, he had to do some repairs and renovations. It was at this time that he entered into an oral agreement with the landlord's son, which he alleged was with the consent of the landlord, for a three year lease with an option for renewal on the same terms. According to him, the renovations cost him about $8,000/-.

Under cross-examination, the Defendant stated that it was the landlord's son who informed him about the term of the lease and the option to renew. He also stated that the landlord brought the son to him and told him that she had authorised the son to collect the rent and look after the premises. According to the Defendant, the landlord confirmed the terms of the tenancy and the option to renew.

The Plaintiff in his evidence denies knowledge of any agreement made between the Defendant and former landlord, Patricia Perera. She merely informed the Plaintiff that some one was occupying the premises. He, however, instructed his solicitors to do a search of the title and the result was that the title was free from any encumbrances. It was for this reason that he entered into a purchase agreement with the former registered owner. Patricia Perera. The Plaintiff continued to receive the rental of $950/- per month paid by the Defendant. It was sent to the Plaintiff's Solicitors.

It should be observed here that neither the Plaintiff nor the Defendant called the former landlord, Patricia Perera or her son to give evidence. I feel that the evidence of Patricia Perera would be material in this case in determining whether or not there was such an oral agreement alleged to have been made between her and the Defendant. The burden of proving such an agreement creating a 3 year lease *with an option to renew* (the emphasis is mine) for a further term is on the Defendant.

However, taking the evidence as a whole and in particular that the Defendant had spent a considerable sum of money to renovate the premises after several meetings he has had with the former landlord and the son, on the balance of probability, there was such an oral agreement for lease for a period of 3 years *with an option to renew* made between the Defendant and the fomer landlord in 1974 (the emphasis is mine).

Now, the second question is whether this oral agreement made between the Defendant and the former landlord is *binding* on the Plaintiff who bought the land subsequent to the said agreement?

In my judgment, this oral agreement for a term of three years comes under section 213 of the National Land Code (i.e. special provisions with respect to tenancies exempt from registration). Under section 213 sub-section (3) it is provided that no tenancy exempt from registration shall be binding on any person or body to whom the grantor subsequently transfers the reversion expectant thereon, or to whom he subsequently grants any lease, sub-lease, tenancy or charge.

Section 316(1) of the National Land Code, provides that any person "claiming to be entitled to the benefit of a tenancy exempt from registration" may apply to the Registrar for the endorsement of his claim on the registered document of title to the land affected. This, the Defendant has failed to do, although such endorsement by itself is not to be taken as "confirming the validity in respect" of the claim – section 317(5) National Land Code.

Therefore, under section 213(3) National Land Code, this oral agreement is not binding on the Plaintiff.

Likewise, section 228(2) of the Code provides that any option conferred by any oral tenancy shall be *unenforceable*.

One other material point raised in the Defence is that of knowledge or notice of such a tenancy being granted to the Defendant. It was submitted that the Plaintiff was estopped from evicting the Defendant. Counsel for the Defendant further submitted that –

(a) a purchaser is bound by all equities enforced against his previous landlord,

(b) actual notice of occupation or possession amounts to constructive notice of the extent and interest of the person in possession.

In answer to that, my view is that the law governing this particular case is the National Land Code 1965 and section 213(3) does seem to me to impliedly exclude this question of knowledge or notice actual or constructive, because it says that "unless, prior to the date on which the dealing referred to, the tenancy had become protected by an endorsement on the register document of title". See also *Eng Mee Yong* v. *Letchumanan*[1] at p.214 column B, on equitable doctrine of notice.

I also agree with the submission of the Plaintiff's Counsel relating to equitable notice as found in the English law. This principle has no application in land dealings in Malaysia. By section 6 of the Civil Law Ordinance 1956.

"the law of England relating to the tenure or conveyance or assurance of succession to any immovable property or any estate, right or interest therein"

is expressly excluded from the general reception of English common law and rules of equity as part of the law of Malaysia. See *T. Damodaran* v. *Choe Kuan Him*[2] at p.270 column D.

With regard to the counterclaim the Defendant is asking for specific performance against the Plaintiff and relies on section 26 of the Specific Relief (Malay States) Ordinance 1950 which reads as follows:–

"Except as otherwise provided by this Chaper, specific performance of a contract may be enforced by

(a) either party thereto;

(b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract".

A number of authorities were cited before me to show that the particular Ordinance does not apply to land and land tenure cases to third parties who have given value. For a discussion of this subject matter, see *David Wong* on *"Tenure and Land Dealings in the Malay States"* (1975) p.381 – 387.

For the purpose of this case it is important to consider the decision in *Ong Chat Pang* v. *Valliappa Chettiar*[3], the Federal Court decision which touched on section 26 of the Specific Relief (Malay States) Ordinance 1950. In this case, A, the registered proprietor, contracted to sell his land to B. but later transferred it by registration to C. B brought an action against both A and C claiming specific performance of the contract of sale and for an order to have the transfer to C rescinded and, instead, the transfer to himself registered. The High Court gave judgment for B and this was confirmed by the Federal Court. Although the Federal Court judgment was on the question of indefeasibility, the two judges, Suffian and Gill, F.JJ. did make reference to section 26. Gill, F.J. seemed to be of the view that the Malaysian indefeasibility provision appear to contain a wide saving proviso which makes a registered title liable to defeat "by operation of law", and this proviso is wide enough to bring in the operation of section 26.

Counsel for the Plaintiff referred in his argument to a number of amendments which were made prior to 1926 and, in particular, Illustrations (g) and (h) to section 3 of the Specific Relief Enactment 1903. Then in 1926 the F.M.S. Land Code was passed which contained amendments to the Specific Relief legislation which also included the repeal of Illustrations (g) and (h) to section 3 of the Specific Relief Enactment 1903. The former F.M.S. Code 1926 did not, however, amend the general saving provision of the Specific Relief legislation to make it clear that its provisions would not affect the law relating to registration of title.

Counsel for the Plaintiff appears to echo the submission of Dr. David Wong who states on p.386 as follows:–

"The scope of that saving proviso has been discussed elsewhere and it has been submitted that the proviso should be construed to be applicable to cases where a registered title or interest is determined otherwise than by attack of adverse claims. But, even if the proviso is taken as a qualification of the indefeasibility of title so as to render a registered title or interest vulnerable to defeat by adverse claims either by virtue of statutory law or any other law outside the Torrens system, it still cannot bring in the Specific Relief Legislation which, as has been shown, should have no application to land under the Torrens system."

In the absence of a direct authority on this point and with the greatest respect to Gill, F.J. (as he then was), I agree with the submission of the Plaintiff's Counsel and Dr. David Wong that section 26 of the Specific Relief Ordinance 1950 has no application to the Torrens System. In the circumstances, the Defendant's Counterclaim is dismissed with costs.

I give judgment for the Plaintiff in the terms of his prayer in his Statement of Claim except prayer (ii).

Claim allowed.

Solicitors: *Skrine & Co.: Sri Ram & Co.*

SILIMUTHU v. AMALU & ANOR.

[O.C.J. (Yusof Abdul Rashid J.) November 30, 1981]
[Johore Bahru – Civil Suit No. 84 of 1981]

Contract – Sale agreement relating to land by beneficiaries of intestate estate – Letters of Administration not yet obtained – Whether Agreement was enforceable against beneficiaries

Probate & Administration – Intestate estate – Sale agreement entered into by beneficiaries of – Whether said agreement enforceable

One Krishnan died intestate leaving behind the defendants as beneficiaries. On July 20, 1980, the defendants entered into a sale agreement with the plaintiff in relation to a piece of land which formed part of the intestate estate. The said sale agreement was subject to the defendants applying for Letters of Administration and leave of the court to effect the transfer of the said land. In the event that the defendants were unable to take out the Letters of Administration or that should they fail to obtain the requisite leave from the court, they were to return the sum of $4,250 which had been paid by the plaintiff to them. A further sum of $2,750 was due to the defendants on the execution of the transfer of the said land.

The defendants failed to apply for Letters of Administration notwithstanding the plaintiff's request for them to do so. The plaintiff took out an action in court for an order to compel the defendants to do so.

Held; (1) this was a case where the right of the plaintiff rests in contract and a case based on the defendants' contractual obligations founded on a promise to do an act;

(2) the agreement entered into by the defendants with the plaintiff on July 20, 1980 was valid and the plaintiff was entitled on the court order requiring the defendants to apply for permission of the court to sell the said land to the plaintiff in accordance with the said agreement;

(3) accordingly the defendants were ordered to apply for Letters of Administration within one month of the date for judgment and within one month of the grant of Letters of Administration, duly extracted, the defendants were required to apply for leave of the court to have the said land transferred to the plaintiff.

Cases referred to:

(1) *Tan Swee Lan* v. *Engku Nik binti Engku Muda & Ors.* [1973] 2 M.L.J. 187.
(2) *Halijah* v. *Morad & Ors.* [1972] 2 M.L.J. 166.
(3) *Kersah La'usin* v. *Sikin Menan* [1966] 2 M.L.J. 20, 22.
(4) *Haji Osman bin Abu Bakar* v. *Saiyed Noor bin Saiyed Mohamed* [1952] M.L.J. 37.
(5) *Haji Saud* v. *Haji Ahmad & Anor.* [1957] M.L.J. 50
(6) *Smallman* v. *Smallman* [1971] 3 All E.R. 717.
(7) *Woo Yew Chee* v. *Yong Yong Hoo* [1979] 1 M.L.J. 131.

CIVIL SUIT.

C. Sukumaran for the plaintiff.
S. Bala for the defendants.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: One Krishnan s/o Pachar died intestate leaving behind and surviving the defendants, who were the widow and son of the deceased, and some other minor children as beneficiaries who were entitled to the intestate estate. A piece of land held under E. Lease 122, Lot 2134 in the Mukim of Rengam Kluang forms part of the intestate estate. On July 20, 1980, the defendants entered into a sale agreement with the plaintiff in relation to the said land subject to the defendants applying for Letters of Administration and leave of the Court to effect the transfer of the said land. In the event that the defendants were unable to take out the Letters of Administration or that should they fail to obtain the requisite leave from the court, they were to return the sum of $4,250/- which had been paid by the plaintiff to them. A further sum of $2,750/- was due to the defendants on the execution of the transfer of the said land.

On the failure of the defendants, having been requested to do so on several occasions, to apply for Letters of Administration, the plaintiff took out an action in court for an order to compel the defendants to do so. In effect, the plaintiff demanded that the defendants should discharge their obligations under the contract of sale. It is to be noted that the plaintiff did not apply for an order that the defendants shall execute a transfer before first obtaining the Letters of Administration and the requisite leave of the court to sell. In my view this is a case where the right of the plaintiff rests in contract and a case based on defendants' contrac-